U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: April 26, 1990
CASE NO. 87-ERA-2

IN THE MATTER OF

SAMUEL L. THOMPSON,
COMPLAINANT,

v.

THE DETROIT EDISON COMPANY,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER TO SHOW CAUSE

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982). Administrative Law Judge (ALJ) Ralph Musgrove submitted a [Recommended] Order of Dismissal with Prejudice[1] to the Secretary on April 14, 1987. The ALJ's order stated that the parties had agreed to a settlement of the claim. Because no settlement agreement was in the record, on October 28, 1987, the Secretary issued an order to Submit Settlement Agreement. Respondent filed a motion for reconsideration of the

order to submit settlement agreement which was denied by my order of September 29, 1989. By letter dated October 31, 1989 counsel for Respondent submitted a copy of the settlement agreement signed by both parties and a copy of the general release signed by Complainant. Counsel for Complainant also submitted a copy of the settlement on November 1, 1989. The Settlement has been carefully reviewed and, with the exceptions discussed below, I find it fair, adequate and reasonable.

Paragraph 8 of the Settlement requires Complainant not to "participate in, aid, encourage, support or assist in any other claims which may be brought against [Respondent]." Paragraph 12 of the Settlement requires Complainant not to "disclose except as required by law, any complaints or claims ever made about his employment at [Respondent]."

Paragraphs 8 and 12 of the Settlement here would restrict Complainant from providing information to the Nuclear Regulatory Commission (NRC) or any other agency. Such information could be relevant and material to law enforcement investigations by the NRC or other agencies, including investigations by the Department of Labor under the ERA or other laws. Paragraphs 8 and 12 also would prohibit Complainant from voluntarily testifying taking part in, or assisting in any law enforcement proceeding involving an alleged violation by Respondent of the ERA.

I previously considered a similar provision in an ERA case. *See Polizzi v. Gibbs & Hill, Inc*., Case No. 87-ERA-32 Sec. Order July 18, 1989. As I held in that case, these provisions would have the effect of drying up channels of information for the Department of Labor in ERA cases and under other laws, as well as for other agencies in carrying out their responsibilities. For the same reasons as set forth in *Polizzi v. Gibbs & Hill, Inc*. slip op. at 5-7, which I adopt and incorporate here (copy appended), I find paragraphs 8 and 12 of the Settlement void as against public policy, to the extent that they would prohibit Complainant from communicating to federal or state enforcement authorities as identified above.

The remainder of the Settlement may be enforceable if "performance as to which the agreement is unenforceable is not an essential part of the agreed exchange." *EEOC v. Cosmair, Inc*., 821 F.2d 1085, 1091 (5th Cir. 1987) (quoting the Restatement (Second) of Contracts, & 194(l) (1981)). *See also Nichols v. Anderson*, 837 F.2d 1372, 1375 (5th Cir. 1988) ("[I]f less than

---

[Page 3]

all of a contract violates public policy, the rest of the contract may be enforced unless the unenforceable term is an essential part of the contract.") Thus, in *McCall v. United States Postal Service*, 839 F.2d 664 (Fed. Cir. 1988), an employee had settled an action challenging his removal by agreeing that, upon reinstatement for a one year probationary period, he would not appeal any disciplinary action taken against him and also waived his right to file a charge with EEOC. The court held that "even if [the employee's] attempted waiver of his right to file EEOC charges is void, that would not affect the validity of other portions of the agreement." 839 F.2d 664, 666 at *.

Unlike the record before me in *Polizzi*, there is insufficient information in this record from which I can determine whether the parties intended to agree to the remainder of the Settlement if the provisions I have found void, as discussed above, are severed.[2]

Therefore, the parties will be given an opportunity to show cause why the remainder of the agreement should not be approved and the case dismissed.

In addition, the Settlement appears to encompass the settlement of matters arising under various laws, only one of which is the ERA. As stated in *Poulos v. Ambassador Fuel Oil Co., Inc*., Case No. 86-CAA-1, Secretary's Order, issued November 2, 1987, slip op. at 2:

> [The Secretary's] authority over settlement agreements is limited to such statutes as are within (the Secretary's) jurisdiction and is defined by the applicable statutes. See *Aurich v. Consolidated Edison Company of New York, Inc*., Case No. [86-]CAA-2, Secretary's Order Approving Settlement, issued July 29, 1987, *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Secretary's Decision and Order on Remand, issued November 3, 1986.

I have, therefore, limited my review of the Settlement to determining whether the terms thereof are a fair, adequate and reasonable settlement of Complainant's allegation that Respondent violated the ERA.

Accordingly, except as limited above, I find the Settlement to be fair, adequate and reasonable. The parties may show cause within 30 days of receipt of this order why the provisions of

---

paragraphs 8 and 12 of the Settlement which I have found void should not be severed to the extent that they would prohibit Complainant from communicating to federal or state enforcement authorities as discussed above, and the remainder of the Settlement approved and this case dismissed, with prejudice. See order of Dismissal with Prejudice. If no cause is shown by the parties within 30 days as indicated, a final order will be issued approving the Settlement, as severed and interpreted in this order, and this case will be dismissed with prejudice.[3]

SO ORDERED.

ELIZABETH DOLE
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The ALJ's decision is entitled "Recommended Decision." However, under the regulations implementing the ERA, 29 C.F.R. Part 24 (1989), except in limited circumstances, see 29 C.F.R. § 24.5(e)(4), an ALJ's decision is only a recommended decision. Final orders are issued by the Secretary. 29 C.F.R. § 24.6.

[2] Counsel for Respondent submitted a letter he had sent to Complainant stating that

> Mr. Thompson is free to go to the Nuclear Regulatory Commission at any time with any safety concern, and is free to go to the United States Department of Labor at any time upon any matter upon which that agency has jurisdiction, without any fear of any form of retribution from Detroit Edison, and without such being regarded by Detroit Edison as a breach of the terms of the settlement agreement.

However, it is not clear from this letter whether all of the restrictions on Complainant's cooperation with government agencies in law enforcement investigations and proceedings have been waived by Respondent.

[3] Counsel for Respondent requested that the copy of the settlement he submitted be returned to him after the Secretary had reviewed it. However, the copy of the settlement must be made part of the record in the case. 5 U.S.C. § 556(e) (1982).